No. 15681

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, *Appellant,*

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

WRIGHT, INNIS, SIMON & TODD
ARTHUR E. SIMON
DOUGLAS SHAW PALMER
Attorneys for Appellee.

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Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLEE

JURISDICTION

The statement of jurisdiction which is set forth in Appellant's brief is correct.

STATEMENT OF THE CASE

Most of the assertions of fact in the statement of the case which is set forth in the Appellant's brief are correct in themselves. The assertion therein on p. 4 that "Appellee's sole defense is an unlawful oral agreement for a reduced premium in violation of an express statute" is, however, a reiteration of an erroneous conclusion that was overruled by the trial court and that is directly contrary to the construction of the statute by the Supreme Court of Washington. For a proper understanding of the valid agreement concerning the premium to be paid by Appellee for the issuance of these bonds by Appellant, some additional facts should be

mentioned. These facts were substantially undisputed and were the basis of the verdict of the jury, and they compel the conclusion that the premium agreement between the parties was in all respects proper and fair, and in no sense an illegal rebate agreement, as denominated by Appellant.

In April or May, 1955, Appellee and Islands Construction Co. and Montin-Benson Corp., all engaged in the construction business, formed a joint venture to bid upon a contract with the United States for certain construction work for the Air Force in Alaska (R. 103-4, 133-4). It was necessary for the joint venture to accompany its bid with a surety company's bid bond running to the United States. If it won the award the joint venture would also be required to furnish a surety company's performance bond and payment bond running to the United States (R. 175, 294-5).

Over many years Martin Anderson, president of Appellee, had obtained many similar surety bonds through John C. Beeson of McCollister & Co. Over many years Mr. Beeson had also written almost all the surety bonding requirements of Loren Baldwin, president of Islands Construction Co. (R. 264, 293-4). Accordingly, Mr. Anderson and Mr. Baldwin both went in May, 1955, to see Mr. Beeson about surety bonds for the contemplated bid by their joint venture (R. 265, 292-3, 297).

McCollister & Co. was and for many years had been a general agent of the Appellant surety company. It had authority to appoint sub-agents for Appellant, and it acted both as a "wholesaler" and as a "retailer" of Appellant's surety bonds (R. 220). When McCollister

& Co. sold the Appellant's bonds, premium payments were always made to McCollister (R. 208). In its territory, McCollister & Co. was recognized as "Mr. U. S. F. & G." (Appellant) (R. 200).

In May, 1955, Mr. Beeson was vice-president and a shareholder of McCollister & Co. He was and had been for some years an attorney-in-fact for Appellant, executing its surety bonds and affixing to them its corporate seal. Mr. Beeson had been with McCollister & Co. for 22 years. He devoted his time to the surety bond business and was McCollister's specialist in the field (R. 199). He had time and again executed surety bonds for both Mr. Anderson and Mr. Baldwin. When they had problems in connection with bonds or bond applications at McCollister & Co., they understood that Mr. Beeson was the man with whom to deal. As far as they were concerned, in connection with bonds, Mr. Beeson was McCollister & Co. (R. 173, 198-200, 293-4).

When Mr. Anderson and Mr. Baldwin conferred with him in May, 1955, Mr. Beeson could have supplied acceptable surety bonds for their joint venture either from a so-called "board" surety company of which Appellant was one, or from a "non-board" company which he also represented (R. 197-8, 206, 224). The "board" companies were those for which premium rate schedules were filed as a group with the Insurance Commissioner of Washington by a single rating "board" or "bureau" (R. 177-8).

At this time the premium rates on surety bonds issued by "non-board" companies were 25 per cent lower than the rates on surety bonds of the same kind

and amount issued by "board" companies like Appellant (R. 205-6). As a result the "non-board" companies had obtained a much larger percentage of the surety bond business in Washington than elsewhere (R. 225). Appellant and other "board" companies were unhappy about this and for some time had been looking forward to a reduction of their Washington rates to the "non-board" level (R. 236). Mr. Beeson knew that Appellant and other "board" companies were preparing this rate reduction (R. 182, 205-7, 266, 297).

In the past Mr. Beeson had supplied Mr. Anderson and Mr. Baldwin with "non-board" surety bonds (R. 197-8, 206, 266) which they knew were cheaper than "board" company bonds (R. 266, 297). When they told Mr. Beeson that they wanted the lowest possible bond cost Mr. Beeson assured them that Appellant was shortly going to reduce its rates to the "non-board" level and that, if they let him supply Appellant's bonds, they would get the benefit of this reduced premium rate (R. 205-8, 265-70, 297-300).

It was part of the expected function of Mr. Beeson and McCollister & Co. to choose the proper bonding company (R. 325-6). At no time did Mr. Beeson ever tell Mr. Anderson or Mr. Baldwin, nor did they know, that the Insurance Commissioner of Washington had anything to do with surety bond premium rates (R. 264-5, 294). The computation of the premium for the joint venture's bonds required the use of rate schedules found in a large volume which Mr. Beeson and other insurance specialists had in their possession but which Mr. Anderson and Mr. Baldwin did not. Computation of

rates depended upon allocation of the work involved to one of four possible classifications, with adjustments for the amount of the contract and the period for its performance; all matters requiring skill and familiarity with the rate manual (R. 201-3).

Were it not for Mr. Beeson's assurance that the premium for a U.S.F. & G. bond would be no higher than the "non-board" bond, Appellee would have purchased the cheaper "non-board" bonds (R. 271, 300). Relying upon Mr. Beeson's assurance, Mr. Anderson signed Appellant's application form on behalf of Appellee (R. 296). This was a single form of application for all three of the bonds—bid, performance and payment—required on the government contract. If the bid were unsuccessful, the Appellant would charge the joint venture a premium of $5.00 for the bid bond. If the bid were successful, the Appellant would credit the bid bond premium against the multi-thousand dollar premium to be charged for the performance and payment bonds. But the computation of the premium for the performance and payment bonds depended upon the amount and duration of the construction contract, which were unknown at the time the single application form was signed. Consequently, and in accordance with custom, *the application was signed with the space for the amount of the premium left blank,* to be filled in later by Mr. Beeson. Thereafter, without Appellee's knowledge and without authorization from Appellee, someone cause the figure "$47,753.72" to be inserted in this blank, in violation of Mr. Beeson's promise (R. 194-7, 200-1, 295-6). This figure was the premium for

Appellant's performance and payment bonds, if computed on the basis of the "board" company rates in effect in May, 1955, and before the reduction made in July, 1955 (R. 191). This premium figure was based on a two-year period of contract performance (R. 307). On the basis of this premium, the agency commission would be about $8,000. (R. 239-40).

The joint venture was successful in its bid on the Air Force contract and about the middle of June, 1955, Appellant as surety executed separate performance and payment bonds for each member of the joint venture, and delivered the bonds to the respective members for their execution as principals. The back of the performance bond contained a recital that the total premium was $47,753.72. The members of the joint venture signed their respective performance bonds on the face side only, and the manager of the joint venture then delivered all the bonds to the United States (Par. VI of Admitted Facts, R. 57, 116).

Under date of July 1, 1955, McCollister & Co. sent to the manager of the joint venture a statement showing a total bond premium owing of $47,753.72 (Par. VIII of Admitted Facts, R. 57).

On July 5, 1955, a schedule reducing the premium rates of Appellant and other "board" companies by about 25 per cent was filed, for effect after July 20, 1955. Computed under these new rates the total premium for the joint venture performance and payment bonds was $35,576.79 (Par. XI of Admitted Facts, R. 58-9). On the basis of this premium, the agency commission would be about $6,000 (R. 239-40).

Appellee first learned of the amount of the reduction in late July or August, 1955 (R. 303-4). Under dates of August 1 and September 1, 1955, McCollister & Co. continued to send out statements showing a premium owing of $47,753.72, computed under the pre-July "board" rate (Par. VIII of Admitted Facts, R. 57).

During September, 1955, both Mr. Anderson and Mr. Baldwin began to protest to Mr. Beeson the billing under the pre-July "board" rate (R. 275, 302-3). On September 15, 1957, Mr. Baldwin's office received a letter from McCollister & Co. reminding it that the statement of September 1 showed an amount due of $35,815.29 and asserting that this should be paid in three installments of one-third each (R. 129-30). On September 19, 1955, the joint venture paid $11,938.42 on account without protest (Par. VIII of Admitted Facts, R. 57).

In sixteen years of prior dealings McCollister & Co. had never refused to discuss bond premium adjustments with Mr. Anderson or Mr. Baldwin on the ground that the protests were not timely (R. 271). Mr. Anderson and Mr. Baldwin discussed an adjustment of this current bond premium with Mr. Beeson several times from October to December, 1955, and were told that Mr. Beeson was working on it. They understood that they would pay in accordance with their original agreement for the reduced rate, and relied on this understanding in making the payments on account. Meanwhile they paid another $11,938.43 on account in October, 1955. But McCollister & Co. kept sending out

statements on November and December 1 based on the pre-July "board" rate (R. 212-14, 270-6, 302-6, and Par. VIII of Admitted Facts, R. 57). And finally Mr. Friday, president of McCollister & Co., asserted that adjustment was impossible because of the Appellant's alleged reinsurance commitment on the basis of the pre-July "board" premium rate R. 230-1, 272-3).

Having rejected a tender of the balance of the premium due under the terms of the oral contract, Appellant brought suit against Appellee alone on the latter's alleged written several engagement to pay a premium of $47,753.72 (Par. V of Complaint, R. 4). Appellee's answer set forth as an affirmative defense that the amount of the premium was a blank at the time of the signing of the application (Exhibit A to Complaint) and that the same was agreed to be filled with a figure calculated upon the basis of reduced rates then contemplated by Appellant (R. 18-19). The tender of the admitted balance due Appellant on this basis was kept good by payment into court (Par. XII of Admitted Facts, R. 59). Appellant's reply denied the agreement pleaded in the answer and alleged that the same would be illegal under the Insurance Code (R. 28-33). The jury found that the agreement had been made and the trial court held that it was not void as between the parties under Washington law.

ARGUMENT

1. The premium agreement is valid

A. The "rebate" sections of the Insurance Code apply only to premiums on insurance "policies," and have no application to premiums on surety bonds

Appellant concedes that the jury necessarily found that its agent John C. Beeson orally promised Appellee that the premium for Appellant's surety bonds would be based on the reduced rates which were soon to go into effect, and which did in fact go into effect within about a month of the delivery of the bonds.

Appellant contends that this agreement is made void by the Insurance Code of 1947. While Appellant on pp. 8-9 of its brief quotes three "rate filing" sections of the Code (.19.04, .19.05, .19.28), its argument rests chiefly on the alleged applicability here of the "rebate" provisions in Section .30.14 and especially in Section .30.17 of the Code. Thus Appellant on p. 8 of its brief calls the premium agreement here an illegal "rebate," and on p. 11 of its brief says that "Appellee is asking the court to aid it in violating Section .30.17 of the Insurance Code which prohibits the Appellee from receiving or accepting, 'directly or indirectly, any rebate of premium'."

Initially we maintain that the oral premium agreement is valid and that these "rebate" provisions simply do not apply to surety bond premiums at all. These provisions purport only to prohibit the giving and receiving of "rebates" of premiums on insurance *"policies."* Surety insurance contracts and surety bonds

are not "policies" either in common usage in the business world or in the Insurance Code. This becomes clear when the "rebate" provisions of the Code are examined in the context of the following pertinent provisions taken from the Insurance Code of 1947, L. 1947, c. 79 (emphasis is added in text and R.C.W. reference is given at end of each section quoted).

The Code defines the term "policy" and requires that a "policy" contain a statement of the premium, but expressly excludes "surety insurance contracts" from this requirement:

> "Sec. .18.14 *Content of Policies in General*: 1. The written instrument, in which a contract of insurance is set forth, is the *policy.*
>
> "2. A *policy* shall specify:
>
> "(1) The names of the parties to the contract. The insurer's name and type of organization shall be clearly shown in the policy.
>
> "(2) The subject of the insurance.
>
> "(3) The risks insured against.
>
> "(4) The time at which the insurance thereunder takes effect and the period during which the insurance is to continue.
>
> "(5) *A statement of the premium, other than as to surety bonds,* and if other than life, disability, or title insurance, the premium rate.
>
> "(6) The conditions pertaining to the insurance.
>
> "3. If under the contract the exact amount of premiums is determinable only at termination of the contract, a statement of the basis and rates upon which the final premium is to be determined

and paid shall be furnished any policy examining bureau having jurisdiction or to the insured upon request.

"4. *This section shall not apply to surety insurance contracts.*" R.C.W. 48.18.140.

With respect to "policies," the Code provides:

"Sec. .18.18 *Stated Premium Must Include All Charges*: 1. The premium stated in the *policy* shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.

"2. No insurer or its officer, employee, agent, solicitor, or other representative shall charge or receive any fee, compensation, or consideration for insurance which is not included in the premium specified in the *policy*.

"3. Each violation of this section is a gross misdemeanor." R.C.W. 48.18.180.

"Sec. .18.19 *Must Contain Entire Contract*: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the *policy*." R.C.W. 48.18.190.

The provisions do not apply to surety bond premiums, which are not required to be stated in the surety insurance contract; and they do not apply to a surety contract of insurance, which is not required to be contained in a "policy." Appellant errs on p. 27 of its brief when it seeks to make these provisions apply in the instant case by assuming that "As necessarily interpreted in the application of the Insurance Code to the surety business," the word "policy" in the statute means "surety bond."

The inapplicability of the term "policy" in the Insurance Code to surety bonds is further borne out by the Code requirements that the application be made part of the "policy":

> "Sec. .18.08 *Application as Evidence* : 1. No *application* for the issuance of any insurance *policy* or contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of the *application* was attached to or otherwise made a part of the *policy* when issued and delivered. This provision shall not apply to policies or contracts of industrial life insurance. * * *." R.C.W. 48.18.080.
>
> "Sec. .18.52 *Construction of Policies*: Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the *policy,* and as amplified, extended, or modified by any rider, endorsement, or *application* attached to and made a part of the *policy."* R.C.W. 48.18.520.

The attaching of the application to the "policy" is customary with life and other kinds of insurance, but it would be wholly inappropriate to attach a construction company's bond application to the surety bond itself for delivery to the contract obligee. Yet if the term "policy" means "surety bond," as Appellant contends, these statutes would require this, and would bar Appellant's action here because Appellee's application was not attached to the "policy" [bond] delivered to the United States.

The "rebate" provisions are addressed to the giving and receiving of "rebates" of premiums on "policies";

"Sec. .30.14 *Rebates*: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the *policy*.

* * *

"3. This section shall not apply to the allowance by any marine insurer, or marine insurance agent, general agent, broker, or solicitor, to any insured, in connection with marine insurance, of such discount as is sanctioned by custom among marine insurers as being additional to the agent's or broker's commission." R.C.W. 48.30.140.

"Sec. .30.16 *License Revocation for Rebates*: The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker, or solicitor guilty of violating any provision contained in sections .30.14 and .30.15 No such insurer, general agent, agent, broker, or solicitor shall, following any such revocation, be eligible for a certificate of authority or license within one (1) year after such revocation." R.C.W. 48.30.160.

"Sec. .30.17 *Receiving Rebate*: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or

any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the *policy,* or any commission on any insurance *policy* to which he is not lawfully entitled as a licensed agent, broker, or solicitor. The retention by the nominal policyholder in any group life insurance contract of any part of any dividend or reduction of premium thereon contrary to the provisions of section .24.26, shall be deemed the acceptance and receipt of a rebate and shall be punishable as provided by this code.

"2. The amount of insurance whereon the insured has so received or accepted any such rebate or any such commission, other than as to life or disability insurances, shall be reduced in the proportion that the amount or value of the rebate or commission bears to the premium for such insurance. In addition to such reduction of insurance, if any, any such insured shall be liable to a fine of not more than two hundred dollars ($200)." R.C.W. 48.30.170.

That these "rebate" provisions do not apply to discounts or reductions of premiums on surety bonds is borne out also by the very contents of these provisions. "Rebate" Sec. .30.14-3, quoted above, expressly exempts discounts on marine insurance. Marine insurance contracts are normally contained in "policies" and, but for the express exemption, such discounts would be prohibited. But surety contracts are not contained in "policies" and hence are exempted from the provision by definition alone.

Similarly, "rebate" Sec. .30.17-2, quoted above, pro-

vides two different penalties against a person who has received "any such rebate", *i.e.,* a rebate not specified his "policy". These penalties are a fine and a reduction of the amount of insurance. If the word "policy" meant "surety bond," as Appellant argues, it would follow that, under the terms of the statute, one of the penalties for Appellee's receiving a premium reduction would be the reduction of Appellant's bond running to the United States. Whereupon Appellant states on p. 26 of its brief that "For patent reasons" the Insurance Code does not attempt to impose this penalty in the case of surety bonds. But the difficulty which Appellant has to explain away arises only because Appellant seeks to make "policy" mean "surety bond." This difficulty vanishes and the statute is left wholly consistent and operative when it is recognized that a "surety bond" is not a "policy" and that the statute does not purport to deal with surety bond premiums. This is made clear by the fact that the insurance reduction penalty provided in the statute would apply to life and disability insurance, which is evidenced by a "policy," were it not for the express exclusion of such penalty for these types of insurance. No exemption is needed for surety bonds, however, because they do not involve a "policy."

Since the "rebate" provisions of the Insurance Code have no application at all to surety bond premiums, the agreement between Appellant and Appellee for the bond premium at the reduced rate shortly thereafter made effective is a completely valid contract which is left wholly untouched by the Insurance Code.

B. Even where the Insurance Code has some application to surety bond premiums, the agreement here is valid under the *Way* case

Even if the "rebate" sections quoted above should be held applicable to the agreement here to compute a surety bond premium on the basis of an anticipated reduction of rates, the sole effect of the sections is to subject the giver and the recipient of the reduction to the express statutory penalties — revocation of the license of the giver, under Sec. .30.16 (quoted above at p. 13), and a fine of $200 for the recipient, under Sec. .30.17 (quoted above at pp. 13-14). Moreover, the "rate filing" Sections .19.04, .19.05 and .19.28, quoted on pp. 8-9 of Appellant's brief apply only to the insurer, and not to the insured, and the sole effect of these sections upon a deviation from the filed rate is to subject the insurer to a fine of up to $500, under Sec. 19.43 (R.C.W. 48.19.430). Since these are the only penalties specified for the violation of the "rebate" and "rate filing" sections (the reduction of insurance being inappropriate in the case of surety bonds), the statutes do not invalidate an agreement for a premium at an anticipated reduced rate.

This has been conclusively established in Washington by the controlling case of *Way v. Pacific Lumber & Timber Co.,* 74 Wash. 332, 133 Pac. 595 (1913). In that case, as here, plaintiff agreed to provide insurance (there apparently property insurance) at a premium rate less than the "board" rate. Subsequently, as here, the plaintiff sought to recover the difference between the agreed amount paid and the higher amount com-

puted under the scheduled rate upon the theory that the contract for the payment of the lesser amount was illegal and void under the Insurance Code of 1911. The Supreme Court of Washington, in a unanimous decision, sustained a judgment for the defendant. The court, in disposing of the contention of the plaintiff here, used language which is apposite to the instant situation (74 Wash. 333-4):

> "We are invited by defendant to discuss the constitutionality of the act of 1911 in so far as it gives to insurance companies and other outside agencies the right to fix rates that are binding upon the state and its citizens, but we think it unnecessary to go into this phase of the case; for, as we view it, plaintiff cannot recover upon general grounds. The contract was made and executed. Plaintiff can only recover upon a contract, express or implied. That he cannot recover upon an express contract goes without saying, for the amount agreed to be paid for the policies has been paid. There is no implied contract unless it is in virtue of § 33 of the insurance code. This section is designed to prevent rebating. It penalizes a company, agent, solicitors, or broker by revoking its or his license, and the property owner by reducing the insurance in such proportion as the amount of the rebate bears to the total premium, and by making him liable to pay a fine 'of not more than two hundred dollars.'
>
> "Plaintiff's error lies in the assumption that the contract between the copartnership and the defendant was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act.
>
> " 'It is a general proposition, sustained by the

weight of authority, that where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so fixed is exclusive of any other.' *LaFrance Fire Engine Co. v. Mt. Vernon,* 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827.

"See, also, *Horrell v. California, Oregon & Washington Homebuilders' Ass'n,* 40 Wash. 531, 82 Pac. 889. The statute strikes no blow at the business of insurance, neither does it assume to void contracts. Its purpose is to regulate, not to prohibit.

" 'When a statute is . . . a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid.' Sutherland, Statutory Construction, §336.

"The distinction between a valid contract but one subjecting the contracting parties to penalties and one made in contravention of a positive statute, or one declaring a public policy, will be illustrated by comparing the cases we have just cited with the case of *Carstens Packing Co. v. Southern Pac. R. Co.,* 58 Wash. 239, 108 Pac. 613, 27 L.R.A. (N.S.) 975."

The *Way* case makes irrelevant all the cases cited by Appellant on pp. 12-22 of its brief for the proposition that, as Appellant states on p. 12 of its brief, "an agreement violating an express statute is usually void."

The *Way* case is not a sporadic or isolated expression on the point. On the contrary, it has never been criticized, but has been cited repeatedly with approval on the point in subsequent opinions. *Ferguson-Hen-*

drix Co. v. Fidelity and Deposit Co., 79 Wash. 528, 532, 140 Pac. 700 (1914); *Lane v. Henry,* 80 Wash. 172, 174, 141 Pac. 365 (1914); *Kidder v. Hartford Accident & Indemnity Co.,* 126 Wash. 478, 480, 482, 218 Pac. 220 (1923) (holding an oral contract for accident insurance valid although the Insurance Code of 1911 required the "policy" to contain the entire contract); *Yakima Lodge v. Schneider,* 173 Wash. 639, 643, 24 P.2d 103 (1933); *Fisher v. Thumlert,* 194 Wash. 70, 74, 76 P.2d 1018 (1938).

The Appellee submits that the only significant factual difference between the *Way* case and the instant case militates in favor of Appellee. In the *Way* case, for all that appears in the opinion, the plaintiff had promised to the defendants a reduced rate not available to anyone else, *i.e.,* a solitary discriminatory discount. Here, however, the Appellant promised to the Appellee a reduced rate that was then available from Appellant's competitors, and which Appellant was then planning to adopt and which it did adopt shortly thereafter.

Appellant's first attempt to avoid the Way case.

In the District Court the Appellant sought to avoid the effect of the *Way* case by pointing out that the "rebate" provisions in Section 33 of the Insurance Code of 1911, which were considered in the *Way* case, were repealed by the new codification of the Insurance Code in 1947. On pp. 9-11 of its brief here, Appellant relies upon the "rebate" provisions in Sections .30.14 and .30.17 of the Insurance Code of 1947, quoted above, and on p. 29 of its brief the Appellant refers to "the repealed Insurance Code of 1911."

Both the "filing" and the "rebate" provisions of the two Codes are substantially identical. (For 1911 Code predecessor of 1947 Code "filing" provisions quoted by Appellant on pp. 8-9 of its brief, *cf.* L. 1911, c. 49, §§73, 74, pp. 209-10).

For the convenience of the Court, we reproduce in parallel columns the provisions, so far as applicable to this discussion, of Section 33 of the Insurance Code of 1911 and the corresponding provisions of the 1947 Code which Appellant asserts repealed the earlier provisions:

Code of 1911 (L. 1911, c. 49, p. 195-6)	Code of 1947 (L. 1947, c. 79, p. 481-3)
"Sec. 33. *Rebates Prohibited.* No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for in-	"Sec. .30.14. *Rebates.* 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, divi-

Code of 1911
(L. 1911, c. 49, p. 195-6)
(Continued from page 20)

surance, on any risk in this state now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, agent, solicitor, or broker, personally or otherwise, offer, promise, give, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy.

"The license of any insurance company, agent, solicitor, or broker who violates the provisions of this section shall be revoked and no license shall be issued to such company, agent, solicitor, or broker within one year from the date of the revocation of the license.

Code of 1947
(L. 1947, c. 79, p. 481-3)
(Continued from page 20)

dends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy." R.C.W. 48.30-.140.

* * *

"Sec. .30.16. *License Revocation for Rebates*: The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker, or solicitor guilty of violating any provision contained in sections .30.14 and .30.15. No such insurer, general agent, agent, broker, or solicitor shall, following any

Code of 1911 (L. 1911, c. 49, p. 195-6) (Continued from page 21)	Code of 1947 (L. 1947, c. 79, p. 481-3) (Continued from page 21)
	such revocation, be eligible for a certificate of authority or license within one (1) year after such revocation." R.C.W. 48-.30.160.
"No insured person or party shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or agent's, solicitor's, or broker's commission thereon payable on the policy, or on any policy of insurance, or any favor or advantage or share in the dividend or other benefits to accrue thereon, or any valuable consideration or inducement, not specified in the policy contract of insurance;	"Sec. .30.17. *Receiving Rebate*: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. The retention by the nominal policyholder in any group life insurance contract of any part of any dividend or reduction of premium thereon contrary to the provisions of section .24.26, shall be deemed the acceptance and receipt of a rebate and shall be punishable as provided by this code.

Code of 1911 (L. 1911, c. 49, p. 195-6) (Continued from page 22)	Code of 1947 (L. 1947, c. 79, p. 481-3) (Continued from page 22)
"the amount of the insurance whereon the insured has received or accepted, either directly or indirectly, any rebate of the premium or agent's, solicitor's, or broker's commission thereon, shall be reduced in such proportion as the amount or value of such rebate, commission, dividend, or other consideration so received by the insured, bears to the total premium on such policy, and any such insured shall be liable, in addition to having the insurance reduced, to a fine of not more than two hundred dollars. * * * ."	"2. The amount of insurance whereon the insured has so received or accepted any such rebate or any such commission, other than as to life or disability insurances, shall be reduced in the proportion that the amount or value of the rebate or commission bears to the premium for such insurance. In addition to such reduction of insurance, if any, any such insured shall be liable to a fine of not more than two hundred dollars ($200)." R.C.W. 48.30.170.

It is apparent from a comparison of these "rebate" provisions of the Codes of 1911 and 1947 that the new codification incorporated the language of the old and did not alter in substance the pre-existing law upon the point here under discussion. Even more significant is the fact that, despite the assertion by the Supreme Court in the *Way* case that an insurance contract for a premium at less than the scheduled rate was not void in the absence of an express statutory provision to that effect, the 1947 codification still contains no such provision.

In this connection the observations of the Supreme Court of Washington in *Yakima Valley Bank & Trust Co. v. Yakima County,* 149 Wash. 552, 556, 271 Pac. 820 (1928) are apposite:

> "At the extraordinary session of the legislature in 1925, a new act was passed governing the assessment, levy and collection of taxes. But an investigation of its terms indicates that it is a codification of already existing statutes for the most part. * * *."
>
> "It is a familiar rule of statutory construction that, when a statute has once been construed by the highest court of the state, that construction is as much a part of the statute as if it were originally written into it. 36 Cyc. 1143. The rule is stated by Ruling Case Law, Vol. 25, p. 1075, as follows:
>
> " 'Construction of Re-enacted Statutes. — It is a settled rule of statutory construction that when a statute or a clause or provision thereof has been construed by the court of last resort of a state, and the same is substantially re-enacted, the legislature adopts such construction, unless the contrary is clearly shown by the language of the act, or the rules of statutory construction have been changed.' "

As recently as October 31, 1957, the Supreme Court of the State of Washington has reaffirmed the doctrine of the *Way* case, to the effect that a provision in a regulatory statute invalidating a certain type of contract does not render such a contract void, in the absence of an express provision to that effect. In *Graves v. Cascade Natural Gas Corp.,* 151 Wash. Dec. 207, the court approved recovery on a contract for legal services, al-

though the public utility regulatory statute provided that the said contract was not valid. The reaffirmance of the doctrine of the *Way* case is apparent in the following quotation from the opinion (p. 210):

> "Nor is there merit in the defendant's contention that the contract was void under the provisions of R.C.W. 80.16. That chapter is a part of the law of this state regulating public utilities and provides, *inter alia,* that no arrangement between a public utility and an 'affiliated interest' is valid unless and until it is approved by the public service commission. We will assume, for the purposes of argument, that the plaintiff firm was an affiliated interest, within the meaning of the statute, because one of its members was made a director of the corporation. Nevertheless, we cannot agree with the defendants that, for this reason, the contract was unenforcible. The penalty for failure to submit a contract or arrangement to the commission for approval is prescribed in R.C.W. 80.16.060. Payments made under such a contract or arrangement will be disallowed in computing rates until they have been approved. There was no evidence that the payments made under the plaintiffs' contract were disallowed for this purpose.
>
> "The defendant urges that a contract 'invalid' under the statute is void and unenforcible. But we cannot agree with this interpretation. If such an arrangement were void, the provision for commission approval after payments had been made would be unnecessary. The very fact that a contract may be approved after payments have been made, even though it was not submitted in the first instance, negatives a legislative intent to make such contracts void. Furthermore, had this been the legis-

lative purpose, the word 'void' could have been used, as it was in R.C.W. 80.12 dealing with attempted transfers of public utility property without commission approval."

Appellant's second attempt to avoid the Way case.

On pp. 24-5 of its brief Appellant contends that in the *Way* case the parties agreed only on the lower premium while here the parties also had a second agreement on a higher premium. Where is this alleged second agreement here? According to Appellant, it rests on the premium figure of $47,753.72 which was inserted in the blank space in Appellee's bond application. The Appellant realizes, however, that "the Appellee will urge the contention that the Appellant was not authorized to insert the sum of $47,753.72 * * * but was only authorized to insert the sum of $35,576.79 * * *." Appellee does so urge, and points to the record in support of its contention (R. 205-8, 265-70, 297-300). In addition, the Insurance Code of 1947 makes Appellant's unauthorized insertion a criminal offense, and bars its action based upon such an insertion:

> "Sec. .18.07 *Alteration of Application*: 1. Any application for insurance in writing by the applicant shall be altered solely by the applicant or by his written consent, except that insertions may be made by the insurer for administrative purposes only in such manner as to indicate clearly that such insertions are not to be ascribed to the applicant. Violation of this provision shall be a misdemeanor.
>
> "2. Any insurer issuing an insurance contract upon such an application unlawfully altered by its officers, employee, or agent shall not have available

> in any action arising out of such contract, any defense which is based upon the fact of such alteration, or as to any item in the application which was so altered." R.C.W. 48.18.070.

But Appellant then says that this contention of unauthorized insertion is not available to Appellee because Appellee supposedly "ratified" the unauthorized insertion of the higher premium figure in the application form when in June, 1955, it accepted and delivered to the United States the Appellant's surety bond containing a recital that the premium was $47,753.72.

Appellant's contention that Appellee "ratified" the higher premium was not presented to the trial court in any form. Consequently Appellant must now urge that this "ratification" occurred wholly as a matter of law. It is clear, however, that a person "ratifies" an act only when he has both the intent to approve the act and full knowledge of all the circumstances. 36 Words and Phrases 132-7 (1940); *Id.* 18-19 (Cum. Supp. 1957). The Supreme Court of the United States said in *Owings v. Hull,* 9 Pet. (34 U.S.) 607, 9 L.Ed. 246, 254 (1835) (cited by Appellant on a different point):

> " * * * No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud. * * *."

It is clear that in the instant case both the intent and knowledge necessary for "ratification" were lacking.

It may be noted in passing that the premium figure recited in the performance bond, whose acceptance by Appellee supposedly "ratified" the recital, appears only on the reverse side of the bond, and that the Appellee's president, Martin Anderson, signed the bond only on its face (R. 116). There was no evidence that Mr. Anderson saw this figure when he signed the bond and passed it on for delivery. Even if Mr. Anderson did see this figure on the back of the bond, his delivery of the bond is not a "ratification" of the same figure which was inserted without authorization in the application form to make the alleged contract upon which Appellant sued.

The premium agreement between Appellant's agent, John C. Beeson, on the one hand, and Appellee and other members of its joint venture on the other, was made in May, 1955. It undertook to give Appellee the benefit of an anticipated reduction in rates which was actually made in July, 1955. When Appellee received Appellant's bond in June, 1955, and delivered it to the United States, the exact amount of the premium to be charged was then unknown and incapable of computation, and did not become ascertainable for another month. This is not like the situation where seller and buyer agree on a definite price of $100 and the seller then bills the buyer at $125, and the buyer "ratifies" the higher price. It cannot be said as a matter of law that Appellee, in delivering the bond, intended to approve the unauthorized insertion in its bond application of the premium figure of $47,753.72, ascertained under an existing rate schedule, when Appellee knew that under its express agreement the actual premium would

not become known until some time later. Although Appellant also seeks on pp. 43-4 of its brief to make this "ratification" argument on the basis of a billing turned into an "account stated," the jury also found against Appellant on this.

Appellant gets no aid from the fact that the standard form of bond prescribed by the United States has a blank space for the amount of premium to be filled in, and that the instructions on the back of the form state that "there shall be no deviations from this form." We may speculate that this was intended to protect the United States by making it more difficult for a contractor to pad his bond cost on a "cost plus" contract with the government. The government contract which Appellee performed in this case was, however, a "lump sum contract" (Ptf. Ex. 1, R. 6) and the statement of the amount of premium is of no conceivable benefit to the United States. Even if it were, no rights of the United States are involved here, and Appellant does not show why this technical requirement of the United States should operate in any way to affect the rights and obligations of the surety and principal between themselves.

The record contains further evidence not only that the Appellee did not "ratify" the unauthorized insertion of the higher "board" premium in its bond application, but that Appellant through its agents recognized there had been no such "ratification."

Appellant's bonds in this case were sold to Appellee and to Islands Construction Co., another member of the joint venture, by Appellant's general agent, Mc-

Collister & Co., through John C. Beeson, McCollister's vice-president and Appellant's attorney-in-fact. Moreover, McCollister & Co. sent out the premium statements and collected the premiums on Appellant's bonds (R. 124, 208, Ptf. Ex. 4). Before this, Martin Anderson, president of Appellee, and Loren Baldwin, president of Islands, had dealt with McCollister & Co. and Mr. Beeson in connection with surety bonds for sixteen years (R. 264, 293-4). In all that time McCollister & Co. had never refused to discuss bond premium adjustments with them on the ground that the protests were not timely (R. 271). In this case Mr. Anderson and Mr. Baldwin discussed an adjustment of the bond premium with Mr. Beeson several times from October to December, 1955, and were told that Mr. Beeson was working on it. They understood that they would pay only the reduced premium (R. 212-14, 270-6, 302-6). Finally, Mr. Nelson Friday, president of McCollister & Co., asserted that adjustment was impossible because of the Appellant's alleged reinsurance commitment on the basis of the pre-July "board" premium rate (R. 230-1, 272-3).

Appellant's third attempt to avoid the Way case.

On p. 26 of its brief Appellant says that:

> " * * * There [in the *Way* case] the only contract sued on had been completely performed by full payment; here the legal contract sued on has been but partly performed by installment payments. There the party plaintiff sought the aid of the court to avoid the rebate agreement; here the party defendant sought the aid of the court to enforce the rebate agreement."

This is simply a restatement of the Appellant's preceding argument on "ratification." Here the "legal contract" and the only contract was the agreement for the premium at the anticipated reduced rate. There was no different contract for a higher premium, although Appellant seeks to find one in the supposed "ratification" of the unauthorized insertion in the Appellee's bond application. Both here and in the *Way* case the defendant promised a lower-than-scheduled rate. In the *Way* case the defendant paid the agreed premium. Here Appellee has paid or tendered all the agreed premium (Pars. VIII, XII of Admitted Facts, R. 57-8, 59). In both cases the plaintiff sought to avoid the agreed rate and in both cases the defendant asked the court to enforce it.

Appellant's fourth attempt to avoid the Way case.

On p. 26 of its brief Appellant states that the *Way* case involved an agreement for a reduced rate on an insurance policy issued to protect the defendant as assured; and that the court there held the agreement valid because the "rebate" provisions of the Insurance Code of 1911 contained an express penalty in the form of a reduction of the amount of insurance. Appellant then contends that here the agreement was for a reduced rate on a surety bond issued to protect the United States; and that this agreement is void because the "rebate" provisions of the Insurance Code of 1947 do not contain such an express penalty (the reduction of insurance, although provided for, being inappropriate in the case of a surety bond). Assuming *arguendo* that the "rebate" provisions of the 1947 Code have any applica-

tion at all to this surety bond situation, which Appellee denies, the argument of Appellant attains plausibility only through Appellant's omission of part of both the statutes on which it relies, and through Appellant's omission of the language of the *Way* opinion which mentions this part of the 1911 Code. As seen from the full comparison set forth above on pp. 20-3, the "rebate" provisions of the 1911 Code and the 1947 Code are in substance the same. Both contain an express penalty of loss of license for one giving a prohibited premium reduction, and a penalty of a $200 fine for one receiving such a reduction. The *Way* case, as seen in the quotation set forth above, expressly mentions the latter penalty. In the light of this fuller examination the *Way* case and this case again turn out to be virtually the same.

Appellant's fifth attempt to avoid the Way case.

On pp. 27-8 of its brief Appellant contends that the Supreme Court of Washington would not have said what it did in the *Way* case if Secs. .18.18 and .18.19 of the Code of 1947 (set forth above) had been in force at the time. We need not indulge in such speculation.

Secs. .18.18 and .18.19 have already been quoted and discussed briefly above on p. 11 in connection with the "rebate" provisions of the 1947 Code. Since these sections refer to an insurance "policy," they have no application to this case involving surety bonds. Appellant's argument for the applicability here of these sections attains plausibility only because Appellant takes the following liberties with the words of the sections:

(1) Part 1 of Sec. .18.18 provides that "The premium

stated in the policy [bond] shall be inclusive of all * * * consideration charged for the insurance * * *." The use of the word "inclusive" might well mean that the premium figure stated in the "policy" ["bond"] shall be only a maximum, *i.e.*, that the premium charged shall not exceed that stated in the "policy" ["bond"]. Appellant says, however, that the word "inclusive" means that the "correct amount of premium be stated in the bonds." If this meaning is accepted, other consequences follow from the parts of the section which Appellant omits from its quotation. Part 2 provides that no insurer "shall charge * * * any * * * consideration for insurance which is not included in the premium specified in the policy [bond]." And Part 3 of the section provides that "Each violation of this section is a gross misdemeanor." If we accept Appellant's contention that the word "inclusive" in Part 1 requires a statement in the bond of the "correct" premium and not just the maximum to be charged, then it follows that Appellant's charging a lower premium than that specified in the "policy" ["bond"] would subject it to a criminal penalty. And under the *Way* opinion, which relied on the statutory provision for penalties in the form of a fine as well as reduction of insurance, the express imposition of this penalty in Sec. .18.18 makes it exclusive of any other, so that the agreement here for a reduced premium is still valid.

(2) Appellant quotes Sec. .18.19 in full:

> "Sec. .18.19 *Must Contain Entire Contract*: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."

In attempting to apply this section on p. 27 of its brief, the Appellant again reads the word "bond" for "policy." This switch, while unwarranted, can at least be made in the "rebate" sections and in Sec. .18.18 noted above, without totally destroying their sense when applied to surety insurance. But reading the word "bond" for "policy" in Sec. .18.19 leaves the section as remote from application to surety insurance as if the substitution were not made. Accepting *arguendo* the Appellant's assumption that the word "policy" means "bond," the section would then read for surety purposes that the "policy" ["bond"] must include the entire "contract of insurance" between Appellant insurer and Appellee. But this is no help to Appellant, for the bond here does not contain any contract at all between Appellant and Appellee. The contract upon which Appellant sues is allegedly contained in Appellee's application form. (Appellant states on p. 24 of its brief that the Appellee "bound itself" to pay the higher premium "in its application for the bonds.") To avoid this difficulty, the Appellant turns the statutory words "contract of insurance" in Sec. .18.19 into the words "amount of premium." With this second switch, Appellant makes the section say something different from its own declaration. The section then declares, says Appellant on p. 27 of its brief, that "no modification of the amount of premium [contract of insurance] 'shall be valid unless in writing and made a part' of the bonds [policy]." But after substituting "policy" for "bond" and "amount of premium" for "contract of insurance," in order to get under the statute, Appellant has to slide back somehow to the bond application of Ap-

pellee which allegedly contains the contract sued upon. So Appellant says on p. 28 of its brief that the contract on which it relies has now become not just the "policy" or "bond" but "three documents" consisting of the bond application, the performance bond, and the payment bond. Merely to follow this distortion of the statute is to perceive its inapplicability to this case. In addition, by the express terms of the 1947 Insurance Code, the application which in this case was not attached to the "policy" ["bond"] could not be considered a part of the insurance contract. The applicable sections are set forth above at pp. 12, 26-7.

Appellant's sixth attempt to avoid the Way case.

As noted above, the *Way* case has been cited repeatedly with approval by the Supreme Court of Washington on the point involved here. One of these approving opinions was delivered in the insurance case of *Kidder v. Hartford Accident & Indemnity Co.*, 126 Wash. 478, 218 Pac. 220 (1923), upholding an oral contract of accident insurance although the Insurance Code of 1911 required the written policy to contain the entire contract. Appellant glosses over this case on p. 29 of its brief with the remark that "The ruling is without authoritative precedent for this court because it involved different parties, different issues, and different provisions of statute." But an examination of the *Kidder* opinion reveals its pertinence here.

In the *Kidder* case the plaintiff sued an insurer on an oral contract of accident insurance. The insurer's defense was "that it could not obligate itself except upon

the issuance of a written policy at the rate filed." 126 Wash. at 479. To this defense the Supreme Court said at 126 Wash. 480:

> " * * * In the case of *Way v. Pacific Lum. & Timber Co.,* 74 Wash. 332, 133 Pac. 595, 49 L.R.A. (N.S.) 147, there was called in question the provisions of the insurance code making it unlawful to sell insurance at less than the scheduled rate. It was held in that case that error lies in the assumption that the contract between the agent and insured was void, whereas the rule is that a contract which violates a statutory regulation of itself is not void unless made so by the terms of the act. It is not claimed, as we understand, that there is any provision of the insurance code which for that reason either avoids or prohibits an oral contract of insurance. * * *."

The court then analyzed the applicability of the Code to different kinds of insurance and held that one section which Appellant contended applied to accident insurance was intended, although found in a division of the Code devoted to life, health and accident insurance, to apply only to life insurance. After quoting another Code section cited by Appellant, the court said (126 Wash. 481-2):

> "This section deals with written health and accident policies and has nothing to do with oral contracts therefor. Suppose that a health and accident policy were written and delivered in violation of the terms of the section, there is nothing in the section which provides that the policy shall be void, for 'the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act.' *Way v. Pacific Lum. & Timber Co., supra.*

"In the case of *Ogle Lake Shingle Co. v. National Lum. Ins. Co.,* 68 Wash. 185, 122 Pac. 990, this court said: 'It is now well established that contracts of insurance may rest in parol.' While it is true the cases from this court referred to were fire insurance cases, we are aware of no reason why the rule should be different in accident insurance cases, under our statutes. All of them are governed by the rule stated in Sutherland, Statutory Construction, quoted in *Way v. Pacific Lum. & Timber Co., supra,* as follows:

" 'When a statute is . . . a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid'."

Thus the *Kidder* case supports the contention of Appellee here in two important respects:

(1) The *Kidder* case shows that because the Insurance Code (of both 1911 and 1947) deals with all kinds of insurance, a given provision of the Code must be analyzed carefully to determine its applicability to a given kind of insurance. There the court held that the insurer could not apply to its accident insurance a section of the Code which examination revealed was directed only to life insurance. Similarly the Appellant here cannot apply to its surety insurance the "rebate" provisions of the Code which examination reveals are directed only to kinds of insurance where "policies" are issued.

(2) The *Kidder* case also affirms the rule of the *Way*

case that an insurance agreement which violates a statute is not void unless the statute expressly makes it so. This was applied in the *Way* case to property insurance, in the *Kidder* case to accident insurance, and in this case should be applied to surety insurance.

Appellant's seventh attempt to avoid the Way case.

On pp. 30-33 of its brief the Appellant cites four cases involving the Insurance Code of 1911, in an attempt to show that the *Way* case is not controlling here:

(1) On p. 30 of its brief Appellant sets forth a quotation from *Gray v. Boyle,* 55 Wash. 578, 579, 104 Pac. 828 (1909) in which the court, considering the rights of the holder of a negotiable instrument, expressly "assumes" the very point at issue here in a case between an insurer and its insurance customer. If this dictum ever were relevant in a situation like that presented here, it need only be observed that the *Gray* dictum was overruled by the *Way* case four years later.

(2) On p. 30 of its brief Appellant seeks to apply a quotation from *Calvin Phillips & Co. v. Fishback,* 84 Wash. 124, 128, 146 Pac. 181 (1915) to facts which are the very reverse of those to which the quotation is addressed and which are present here. In the *Calvin* case, the Insurance Commissioner of Washington sued on the basis of the *Way* case to revoke the license of an insurance agent for his alleged violation of the "rebate" statute. The court held that there had been no "rebate" and also said that the *Way* case was of no help to the Commissioner because its rule was "that one cannot avoid his contractual obligations because

of his own violation of statutes * * *.'' 84 Wash. at 128. This quoted rule does, however, bar Appellant's action here. Appellant is the one seeking to avoid its contract for the reduced premium on the ground that the contract violates the Insurance Code. Appellee is not seeking to avoid its premium contract but is standing upon it.

(3) On pp. 31-2 of its brief Appellant seeks to apply a quotation from *Moser v. Pantages,* 96 Wash. 65, 69-70, 164 Pac. 768 (1917) to facts quite different from those to which the quotation is addressed and from those which are presented here. In the *Moser* case an insurance agent sued on the basis of the *Way* case to collect premiums on policies which he had sold in violation of the ''rebate'' statute. The court held the *Way* case of no aid to him because ''We were there considering a contract which the agent was seeking to avoid for his own benefit,'' and the rule held applicable in the *Moser* case was ''that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.'' 96 Wash. at 70. It is obvious from this statement that the *Way* rule does apply to the instant case involving a contract for a reduced premium which Appellant is seeking to avoid for its own benefit.

(4) On pp. 32-3 of its brief Appellant sets forth a quotation from *Wolfe v. Philippine Investment Co.,* 175 Wash. 165, 168, 27 P.2d 132 (1933) which simply mentions the *Calvin* and *Moser cases* and which Appellant does not try to relate to the instant case.

From the foregoing examination of Appellant's

seven attempts to avoid the *Way* case it is clear that none is valid and that its rule is applicable here. We do not contend that, in all cases, a contract which does not comply with a statute is nevertheless valid between the parties. We do contend that this is a question of public policy within the province of the state legislature and the courts of the state, in any given case. We contend that in this instance the Supreme Court of the State of Washington has declared that there is no public policy in that state and no legislation which makes the instant agreement void. There is no public policy in Washington, in short, which would invalidate the fair and just agreement between these parties and enable Appellant and its agents to profit by their own alleged misquotation of rates, despite plainest principles of estoppel.

2. Appellant's agent had authority to bind Appellant on the premium agreement

The agreement in this case for a premium at a reduced rate shortly to be determined was made between Martin Anderson and Loren Baldwin, presidents respectively of Appellee and of its co-venturer Islands Construction Co., and John C. Beeson, attorney-in-fact of Appellant and vice-president and a shareholder of McCollister & Co., general agents of Appellant. Appellee contends that Mr. Beeson's agreement was binding upon Appellant because within the apparent scope of his authority. This issue was submitted to the jury under an instruction (R. 342-3) to which Appellant made no objection. Therefore Appellant must now con-

tend that Mr. Beeson had no authority to bind Appellant as a matter of law.

The evidence upon which the question of Mr. Beeson's authority was submitted to the jury is summarized above on pp. 2-5 in Appellee's statement of the case. We note here simply that Appellee and its co-venturer have been supplied with bonds for many years by Mr. Beeson, who was attorney-in-fact for Appellant and also vice-president, shareholder and bond specialist of McCollister & Co., Appellant's general agent. It was the expected function of Mr. Beeson and McCollister & Co. to choose the bonding company. Mr. Beeson executed Appellant's bonds here. Mr. Anderson and Mr. Baldwin, with whom Mr. Beeson made the premium agreement, did not know that the Insurance Commissioner had anything to do with bond rates, and the computation of a premium required skill and familiarity with a rate manual which Mr. Beeson had but which Mr. Anderson and Mr. Baldwin did not have.

As a general rule, where an agent is expressly authorized to sell property for his principal, he is also given implied or apparent authority to fix the price of the sale, and a person dealing with the agent is entitled to rely upon this apparent authority. In *Galbraith v. Weber,* 58 Wash. 132, 107 Pac. 1050 (1910), the plaintiff delivered a horse to his agent with authority to sell it. The agent sold the horse to the defendant for $1,000 in notes, discounted the notes, forged notes for $2,700 and gave them to the defendant, and disappeared. The plaintiff sued to recover the horse from the defendant, contending that his agent had no authority

to sell the horse for the price which defendant had paid. The court affirmed a judgment for the defendant based upon a jury verdict, saying (58 Wash. 137-8):

> "We will first notice Boquet's [agent's] apparent power to fix the purchase price. Where the agent has exclusive possession of the property of his principal with authority and for the express purpose of selling it to any purchaser he may find, as in this case, we think a purchaser from such agent would clearly have the right to rely upon the agent having power to agree upon the purchase price. 2 Enc. L. & P. 1001; Mechem, Agency, §362; 1 Clark & Skyles, Agency, §245; *Bass Dry Goods Co. v. Granite City Mfg. Co.,* 119 Ga. 124, 45 S.E. 980.
>
> " * * * So we do not think that these circumstances were so extraordinary as to enable us to say, as a matter of law, they showed want of authority on the part of Boquet to agree upon a sale at $1,000."

The *Galbraith* case has been recently cited with approval on the point of apparent authority in *Larson v. Bear,* 38 Wn.2d 485, 490, 230 P.2d 610 (1951), where the court said:

> "An agent may have what is termed 'apparent' authority. It exists when, though not actually granted, the principal knowingly permits the agent to perform certain acts, or where he holds him out as possessing certain authority; or, as sometimes expressed, when the principal has placed the agent in such position that persons of ordinary prudence are led to believe and assume that the agent is possessed of certain authority, and to deal with him on reliance of such assumption. *Galbraith v. Weber,* 58 Wash. 132, 107 Pac. 1050; *Cannon v.*

Long, 135 Wash. 52, 236 Pac. 788; *Mohr v. Sun Life Assurance Co.,* 198 Wash. 602, 89 P.2d 504; 2 Am. Jur. 68, Agency ,§85."

The rule of the *Galbraith* and *Larson* cases applies equally to this case unless there is some important distinction in the fact that contracts for the sale of horses are not regulated by statute and contracts for the sale of insurance are regulated by statute in some respects. Appellant argues on p. 36 of its brief that the premium agreement made by its agent Beeson was illegal and that an agent has no implied authority to bind his principal upon an illegal contract. To support its contention of illegality, Appellant relies on the "rebate" provisions of the Insurance Code of 1947. As we have seen, however, these provisions do not purport to apply to surety bond premiums and, even if these provisions should be held applicable, their stipulation of express penalties for violation leaves this premium agreement valid under the *Way* case. The rule of the *Way* case applies as well where a premium agreement is made by an insurance agent in violation of the statutory requirement that only the rate then filed be charged. The provisions of an express penalty for this violation again leaves the agreement of the agent valid.

If Appellant's argument were accepted, no corporation could ever be held liable for statutory violations or torts committed by its employees. Yet in both types of cases it is well settled that the act of the agent is that of his corporate principal.

The case of a statutory violation is illustrated by *Regan v. Kroger Grocery & Baking Co.,* 396 Ill. 284,

54 N.E.2d 210, 1 CCH Price Control Cases, Par. 51,107 (1944). There the plaintiff sued a corporation for treble damages for sales made in violation of OPA price regulations. One defense was that the sales were made by agents of the defendant without its knowledge, approval or consent, and in contradiction of its instructions to comply with OPA regulations. To this the court said:

> "It is our conclusion that a corporation, subject to the provisions of the act, is liable for violations by those whom it selects as its representatives, in making sales. This is true regardless of the fact that such representatives are minor in character and have no official status in the corporation and no authority in the formation of its policies, and no voice in the adoption of its practices. In making sales in the line of their employment, such employees are the corporation itself. It can neither repudiate nor disown the acts of its employees, en gaged in transactions which they were employed to make."

Similarly, in *Globe & Rutgers Ins. Co. v. Draper,* 66 F.2d 985 (9th Cir. 1933), this Court held that an insurance company's agent was authorized to bind his company on an oral contract of fire insurance despite the contention of the company that oral contracts of insurance were contrary to the public policy of the State of Washington as set forth in its Insurance Code and that the agent had no express authority to bind it on an oral contract. In the *Globe* case the insurer appointed the San Francisco firm of Edward Brown & Sons its general agent with power to appoint sub-agents; the San Francisco firm then appointed the Spokane firm

of Hahn & Daly local agents of the insurer; one Hahn, a member of the Spokane firm, made the oral contract with plaintiff which was orally accepted by one Weaver in the San Francisco firm. 66 F.2d at 987. Here Appellant surety company appointed the Seattle company of McCollister & Co. its general agent and appointed Mr. Beeson, a vice-president and shareholder of McCollister, its attorney-in-fact. Mr. Beeson made the premium agreement with Appellee.

Concerning the liability of a corporation for torts committed by its agents, the Supreme Court of the United States has said in *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 684, 93 L.Ed. 1628, 1638 (1948):

> " * * * It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent's action, because tortious, is, for that reason alone, *ultra vires* his authority. An argument to that effect was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected. [Citing cases.]
>
> "There is, therefore, nothing in the law of agen-

> cy which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. * * * ''

Appellant bases its rule that an agent has no implied authority to bind his principal upon an ''illegal'' contract upon a quotation from the opinion of Mr. Justice Story in *Owings v. Hull,* 9 Pet. (34 U.S.) 607, 9 L.Ed. 246, 253-4 (1835). An examination of that case reveals, however, that the quotation and the rule which Appellant seeks to draw from it have no application to this case.

In the *Owings* case the defendants, executrices of an estate in Louisiana, made one West their attorney-in-fact with power ''to cause such proceedings to be instituted, as may be necessary to effect a sale of the whole real and personal estate'' of the testatrix ''and generally to do, negotiate and perform all other acts, matters and things in the premises, that circumstances may require, as well judicially, as extrajudicially, for the effectual settlement of the estate, &c.'' 9 L.Ed. at 247. The agent West privately sold to the plaintiff certain slaves belonging to the estate, and pocketed most of the purchase price. The beneficiaries of the estate sued the plaintiff in Louisiana and recovered the slaves, the court holding that the private sale by West ''was absolutely void, because, by the laws of Louisiana, executrices can only sell after an order of court and by public auction, and not by private sale; * * *.'' *Ibid.* The plaintiff then sued the defendant executrices in Maryland to recover the purchase price which he had paid West for the slaves. In his opinion Mr. Justice Story held that the lower court should have given the instruc-

tion which the defendants requested, and which is discussed in the quotation set forth on p. 36 of Appellant's brief. In addition Mr. Justice Story said (9 L.Ed. at 254):

> "The next instruction asked was for the court to instruct the jury that, unless they believed that John K. West strictly complied with the special instructions given him by the defendants in the power of attorney of January, 1816, and caused such legal proceedings to be instituted as were necessary to effect a sale of the personal estate in Louisiana, of which their testatrix died possessed, and under such legal proceedings made a sale of the slaves, being part of the personal estate, to the plaintiff (Hull), and that the slaves were subsequently recovered from the plaintiff, the plaintiff is not entitled to recover. For the reasons already given, this instruction ought also to have been given. *This is not the case of a general agency, but a special agency, created by persons acting in autre droit.* The purchaser was therefore bound to see whether the agent acted within the scope of his powers; and, at all events, he was bound to know that the agent could not, in virtue of any general power, do any act which was not in conformity with the laws of Louisiana. The principals could never be presumed to authorize him to violate those laws; and the purchaser purchasing a title invalid by those laws, must have purchased it with his eyes open." [Emphasis added.]

The language of the *Owings* opinion is inapplicable to the question of the apparent authority of Beeson in the instant case for the following reasons:

(1) There the agent's contract had been held by a

court to be "absolutely void" as a matter of law; here the contract made by Appellant's agent, Mr. Beeson, is valid.

(2) There the agent on behalf of his principal had dealt with the purchaser in a single transaction; here the agent John Beeson, on behalf of Appellant, had dealt with Appellee in a continuing series of transactions of the same kind over many years.

(3) There the agency was a limited one; here the agency for Appellant was a general agency.

On p. 37 of its brief Appellant sets forth a quotation from *Charette v. American Surety Co., etc.,* 49 Wn.2d 777, 780, 307 P.2d 252 (1957) which is doubtless correct as a statement of law but which was applied there to a quite different set of facts than are presented here. In the *Charette* case an insurance agent, in a single transaction with a guardian, wrote a guardianship bond. The agent had no express authority to write such a bond and the court held that the insurer had not relied upon any representation of his authority.

Appellant's mainstay in its argument concerning the lack of apparent authority of Mr. Beeson is *American Surety Co. v. Lind,* 132 Wash. 326, 232 Pac. 280 (1925), whose opinion Appellant sets out in full on pp. 37-42 of its brief. The difference between the *Lind* case and this case is apparent in the following language from the *Lind* opinion:

> " * * * R. L. Kline was then the local agent at Bellingham of the surety company, but without authority to write or execute a bond of this nature for this amount. His authority was to take written

applications for such bonds upon blank forms furnished by the company to be signed by the applicant and then forwarded to the general manager and resident vice president of the surety company at Seattle for acceptance or rejection by him, and the execution of the bond by him as surety for the company, if the application be accepted.

"Lind was well aware of this limited agency power on the part of Kline * * *." 132 Wash. at 327.

* * *

" * * * The application was by Kline forwarded to the general manager and resident vice president at Seattle; and, in compliance with the data and information appearing thereon, after the filling of the blanks, the bond was executed by the surety company as surety and by Lind as principal and delivered to the proper authorities of the United States, as provided by the construction contract theretofore signed. The body of the bond does not seem to show the amount of the premium charged by the surety company.

"A short time after the execution of the bond, the surety company presented to Lind a bill for the premium, claiming $2,790 due thereon. * * *." 132 Wash. at 329.

* * *

"We are not here concerned with any claimed special premium rate contract entered into between Lind and the general manager and resident vice president of the surety company. Whether such a special contract rate with the general manager and resident vice president could be enforced by Lind as against the surety company, we need not here inquire. * * *." 132 Wash. at 330.

Contrast the *Lind* situation with that in the instant case where Beeson, the agent who made the premium agreement, was the attorney-in-fact of Appellant, and signed the bond for Appellant; he was vice-president, shareholder and bond specialist of McCollister & Co., the general agent of Appellant; the billing for the bond premium was made by McCollister & Co.; McCollister and Beeson had been furnishing Appellant's bonds to Appellee for many years; the choice of bonding company was left to Mr. Beeson and McCollister & Co., and only they had the necessary rate information. In addition, Appellant was preparing a reduction of its premium rate of which Beeson had knowledge, in order to make its bonds competitive with those of "non-board" companies whose rates were then available to Appellee and which Appellee was willing to pay.

Appellee submits that on this evidence it cannot be said as a matter of law, as Appellant contends, that Beeson had no implied authority to make this premium agreement. This question was properly submitted to the jury under the instructions of the trial court and the jury properly found in favor of Appellee.

3. There was no "account stated" for a higher premium than that promised by Appellant's agent

Appellant contends on pp. 43-4 of its brief that Appellee failed to make timely protest to statements by McCollister & Co. showing a higher premium than that promised by Appellant's agent, and that this established an "account stated" on which Appellant is entitled to recover. This issue was submitted to the jury under an instruction (R. 345-6) to which Appellant

made no objection. In reaching its verdict the jury necessarily found that there was no account stated. Consequently Appellant must now be urging that an account stated arose solely as a matter of law.

Appellant urges an account stated in the fact that Appellee made payments without protest in September and October, 1955, after receiving statements showing the higher premium amount. It is admitted that these payments were made without protest. This simply means, however, that neither payment was accompanied by a letter to that effect. And the testimony shows why this was unnecessary. Mr. Anderson and Mr. Baldwin, presidents respectively of Appellee and of its co-venturer Islands Construction Co., began to protest orally to Mr. Beeson about the higher premium in September, 1955. In sixteen years of prior dealings with them, McCollister & Co. had never refused to discuss bond premium adjustments with Mr. Anderson or Mr. Baldwin on the ground that the protests were not timely (R. 271). They discussed an adjustment of this bond premium with Mr. Beeson several times from October to December, 1955, and were told that Mr. Beeson was working on it. They understood that they would pay in accordance with their original agreement for the reduced rate, and relied on this understanding in making the payments on account (R. 212-14, 270-6, 302-6).

This testimony qualifies, but does not contradict, the admitted fact that the payments of September and October, 1955, were themselves transmitted without pro-

test. And Appellant waived any objection to this testimony by failing to object to its admission at the trial.

The court's instruction on the issue of account stated was supplied by Appellee in its requested instruction No. 3 (R. 82). Its statement of the law is supported by the following authorities, the first two of which were cited to the trial court (R. 82): 1 C.J., Accounts and Accounting §§249, 251, 264, 276, 289; *Austin v. Union Lumber Co.,* 95 Wash. 608, 610, 164 Pac. 245 (1917) (holding that account stated is "largely a question of intent, to be gathered from the facts of the particular case"); *Goodwin v. Northwestern Mut. Life Ins. Co.,* 196 Wash. 391, 410, 83 P.2d 231 (1938) (holding that execution of contracts and making of payments on basis of statements retained without protest over several years did not create account stated); *United Iron Works v. Rathskeller Co.,* 94 Wash. 67, 68, 161 Pac. 1197 (1916) (holding that silence upon receiving bill and repeated demands for payment "does not of itself constitute an implied agreement as to any sum due to appellant"); *Merritt v. Meisenheimer,* 84 Wash. 174, 146 Pac. 370 (1915) (holding that retention of bills without protest for nearly a year did not create account stated).

The foregoing cases all clearly indicate that the question what length of time of retention of a bill without protest would create an account stated is a jury question under ordinary circumstances. Submission of the issue to the jury here was not error.

CONCLUSION

We have demonstrated, we submit, that the premium agreement herein which the jury verdict confirmed was a valid agreement and that the trial court was right in upholding it. The result is fair. Appellee has paid the same premium which it would have paid to get an acceptable bond from a "non-board" company. It has paid the premium which Appellant would have admittedly charged for this bond if it had been issued a month later, at a time when this bond still had twenty-three months of its two-year term to run.

Were it not for the promise of Mr. Beeson, upon which Appellee and its associates justifiably relied in good faith, Appellee would have purchased "non-board" bonds (R. 270, 300). The cost to Appellee would have been the same. Appellant, however, would not have got the business. By now attempting to repudiate the basis upon which the business was obtained, Appellant seeks to gain an unconscionable $11,938.43 and its agency an even more unconscionable increase of commission exceeding $2,000. If Washington public policy demanded such a result, the injustice would have to be borne. Fortunately, however, there is no such public policy in Washington. Companies like Appellant can not thus profit by deceiving their customers as to their rates. They may not, under Washington law, quote a low rate to get the business, and then sue for a higher amount under pious protestations that they have no selfish motive and are merely protecting the public policy of the State. Common honesty, according to the public policy of the State, requires companies like Appellant

to keep their commitments to their customers, when the latter have acted in good faith. If, in so doing, the companies violate directions of the Insurance Code, that code spells out the penalties, and these are exclusive. The companies are not allowed to profit by their own deception. That, as we understand it, is the public policy of Washington in this field. If this is so, there can be no doubt but that the judgment below was correct and should be affirmed.

Respectfully submitted,

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